

# Idaho

## WATER RIGHTS FACT SHEET

August 15, 2001

### Water Rights System:

The doctrine of prior appropriation or "first in time - first in right" is the basis for administering water rights in Idaho. The constitution and statutes of Idaho declare all the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, and ground waters of the state, to be public waters. A water right is the right to divert the public waters and put them to a beneficial use, in accordance with one's priority date. Idaho's water laws are contained in Idaho Code, Title 42, and can be found at: <http://www3.state.id.us/idstat/TOC/42FTOC.html>

### Responsible Agency:

The Idaho Department of Water Resources (IDWR) is the agency responsible for the allocation of surface and groundwater within the state. The IDWR is also responsible for assisting the courts in the adjudication of water rights, processing change applications, and enforcing the state's water laws. In order to accomplish these tasks, as well as coordinate the management of the state's water, the IDWR has divided the state into more than 50 administrative basins. In addition to the IDWR, the Idaho Water Resource Board, an eight member board appointed by the Governor and confirmed by the state senate, assists in the management of the state's water. The board provides guidance to the IDWR, is responsible for administering certain water programs, and is responsible for applying for and holding new appropriations for instream flow rights.

### Application Process:

Since May 20, 1971, the only one way to establish a water right is by following the application/permit/license procedure discussed below. Prior to May 20, 1971, rights to surface waters were established by simply diverting water and putting it to beneficial use. These water rights are called "beneficial use", "historic use" or "constitutional" water rights. The priority date for a water right established by this method is the date water was first put to beneficial use.

Today, a new water right must be established by filing an application with the IDWR. **Small domestic uses of groundwater and instream livestock water, however, are exempt from the permit application process.** The application, which must quantify and describe the new use, is to be filed with the IDWR, and the filing date establishes the priority date of the water right. Upon receipt of the application, the IDWR notifies to the public by publishing a notice in a local newspaper for two consecutive weeks. For large applications, a notice is also published in a major newspaper in each region of the state. Protests can be filed against the application for a period of thirty days after the final legal notice appears. Protests are accepted from water users and any other entity concerned about the application. Efforts are made to resolve the dispute informally, but if this cannot be achieved, a hearing is scheduled. Hearings are held in accordance with the Idaho Administrative Procedure Act. An application can only be approved if it meets the following criteria:

- \* The new use will not damage existing water rights.
- \* The water supply is sufficient for the purpose of the new use.

- \* The application is made in good faith and is not speculative.
- \* The applicant has sufficient resources to complete the project.
- \* The new use does not conflict with local public interests.
- \* The project is consistent with the conservation of water in Idaho.

A portion of the Snake River Basin is held in trust by the State for the Idaho Power Co. Applications in this area are subject to additional criteria (see Appendix One).

Once a decision on the application is made by the director of the IDWR, any dissatisfied party may appeal the decision. Appeals are handled by a judicial review which is based on the record created in the administrative hearing. Once an application is approved, it is called a "permit." Upon receipt of a permit, the permittee has up to five years to submit proof of beneficial water use. Upon receipt of proof, the IDWR conducts an investigation and then issues a license. A license issued by the state is evidence of a water right. The types of applications which can be filed in Idaho can be seen in Appendix Two.

The time frame to obtain a water right in Idaho is extremely variable. In the best case scenario, the minimum time it could take for an application to be approved and a permit to be issued is forty-five days. If the application is protested or there are other complications, however, it can take much longer. Even after a permit is issued, a licensed water right is not obtained until the permittee submits proof of beneficial use. This time frame depends upon the work involved, but must be completed within five years.

*Point of Diversion and Change of Use Procedures:*

A diversion is generally required to establish a water right. The Idaho Water Resources Board, however, is authorized to acquire water rights without diversions for instream flow. A water right may also be acquired without a diversion to water livestock directly from the stream. These rights are called "instream livestock" water rights.

The place of use, period of use, purpose of use, or the point of diversion can be changed by filing a change application with the IDWR. The change procedures are similar to those for an application for new appropriation, but the decision criteria are different. The IDWR may approve a proposed change if it:

- \* Will not result in injury to the rights of other water users.
- \* Does not constitute an enlargement of the original water right.
- \* Is in the local public interest.
- \* Is consistent with the conservation of water resources within Idaho.

The IDWR may deny the application or approve the change in whole, in part, or approve it subject to conditions necessary to meet the four criteria described above.

*State Recognized Beneficial Uses:*

Aesthetics	Manufacturing
Aquatic Life	Mining
Commercial	Municipal
Cooling	Navigation and Transportation
Domestic	Power
Fire Protection	Recreational Use
Fish Propagation	Stock watering
Ground Water Recharge	Water Quality Control
Industrial	Wildlife
Irrigation	

**Groundwater:**

The application for a groundwater right follows the same application/ permit/ license process as that for surface water. Prior to March 25, 1963, rights to groundwater could be established simply by putting the water to beneficial use. Today, the only exception to the application process for groundwater is a "beneficial use" right for domestic purposes. "Domestic purpose" is limited mainly to single-family domestic purposes, but is defined by statute as "water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of 13,000 gallons per day, or any other uses if the total use does not exceed a diversion rate of 0.04 cubic feet per second and a diversion volume of 2,500 gallons per day." The exemption from the application process for domestic purposes does not include water for "multiple ownership subdivisions, mobile home parks, commercial or business establishments."

Idaho policy states that groundwater is to be managed to allow full economic development while protecting prior right holders. The pumpage from an aquifer is to be limited by the IDWR to prevent its mining. Low-temperature geothermal water (85 to 212 degrees F) is classified as groundwater and managed accordingly. Geothermal sources greater than 212 degrees F are managed under the geothermal statutes.

**Water Rights:**

Any entity can hold a water right in Idaho. The water right can be in the name of an individual, group of individuals, organization, corporation, government agency, etc. The Idaho water board, however, is the only entity that may apply for and hold instream flow water rights. The holder of a water right in Idaho is considered to have established a real property right to that water, much like property rights for land. The constitution and statutes of the state of Idaho protect water rights as private property rights, and those rights can be bought and sold. Idaho has a thriving water market. Water rights can be transferred directly between individual buyers on a permanent basis. This requires filing change of owner and change of use applications with the IDWR. Water rights can also be transferred on a temporary basis through Idaho's water banking program. Idaho water banks are operated by the Water Resource Board and help to facilitate temporary water transfers. If a water right holder has excess water, that water can be deposited in the water bank. An entity that needs water may then rent that water on a one year basis paying the water right holder a fixed price depending upon the purpose and location of use. Water banks are set up according to water districts, and priority is given to irrigation.

A water right can be lost in Idaho by abandonment or forfeiture. Abandonment requires proof of intent, where as forfeiture occurs if the water right is not used for five consecutive years. Water rights lost through abandonment or forfeiture revert back to the state for further appropriation.

**Adjudications:**

The state's district courts are responsible for the general adjudication of Idaho's watersheds. An adjudication is a court action for the determination of existing water rights that results in a decree that confirms and defines each water right. The application/permit/ license procedure described above is for the purpose of establishing new water rights. Adjudications in Idaho involve both surface and groundwater.

When an adjudication of a particular source is commenced, the IDWR is required to notify the water users of the commencement of the adjudication, and notify them that they are required to file a "notice of claim" to a water right with the IDWR. The IDWR then investigates the notices of claim and prepares a report that is filed with the court. Claimants of water rights are notified of the filing of the report and objections may be filed with the court by anyone who disagrees with the findings. If no objection is filed to a water right described in the report, the court decrees the water right as described in the report. If an objection is filed to a water right, the court then determines

the right after a hearing and decrees the water right. Because water rights in Idaho could be established without a permit until 1971, there are many unrecorded, yet valid, water rights in the state. A general adjudication of the Snake River Basin in Idaho is currently ongoing.

Although a "notice of claim" is required in an adjudication, there is another type of claim that may be filed with the IDWR. A "statutory claim" is filed with the IDWR to make a record of an existing beneficial use right. In 1978, a statute was enacted requiring persons with beneficial use rights (other than water rights used solely for domestic purposes as defined above) to record their water rights with the IDWR. The purpose of the statute was to provide some means to record of water rights for which there were previously no records. However, these records are merely affidavits of the water users, and do not result in a license, decree, or other confirmation of the water right.

#### *Ongoing Adjudications:*

The Snake River basin adjudication is the only general adjudication currently being conducted in Idaho. This adjudication began in 1987, and is one of the largest general adjudications in the country. Geographically, it involves thirty-eight of the forty-four counties in Idaho and accounts for about 87% of the state's water rights.

#### **Instream Flows:**

The instream flow program in Idaho is complex and evolving. Instream flows were first recognized in the state in 1974 through legislation that established instream flow as a beneficial use. In that same year the Idaho Supreme Court (in *State Department of Parks v. Idaho Water Resources Department*) confirmed that an appropriation of water does not require a physical diversion. Idaho's instream flow program was further developed in 1978 when the state legislature adopted the Minimum Stream Flow Act. This act allows the Idaho Water Resources Board to apply for and hold minimum stream flow rights through new appropriation. Idaho law is clear in the establishment of instream flow through new appropriation. The Water Resource Board is responsible for filing an application with the IDWR. The application and processing procedures are similar to those for other appropriations except that a hearing must always be held. The decision criteria used by the IDWR are as follows:

1. Is the requested flow the minimum needed for the purpose requested?
2. Will the requested flow interfere with any existing water right?
3. Is it in the public as opposed to a private interest?
4. Is it necessary for the purpose requested (does it meet the beneficial use)?
5. Can the flow be maintained?

All instream right applications must be reviewed by the state legislature which has the authority to accept, reject, or amend the approved application.

The law regarding the establishment of instream flow rights through transfers is less clear. Instream flows can be established through water right transfers, but are limited to temporary transfers of storage rights. Storage water rights can be leased on an annual basis through the state's water banking program. This method has been used effectively in the past by the federal government to augment stream flows for salmon. The depositor of the water, however, cannot specify their preferred intended use. In other words, an individual cannot deposit water in a water bank and state that the use is to be for instream flow. The renter of the water determines the use and water banks give preference to irrigation. The one exception to this is in the Lenhi River basin. In this basin, an entity can deposit water in the water bank for the express purpose of instream flow. This exception is legislatively stipulated and resulted from endangered species concerns in the basin. Entities also cannot transfer water rights to the water board to be held in trust for instream flow. In theory a water right could be gifted to the board and the board could then apply to have it transferred to an instream flow right. Although permissible, this has not been

attempted and it is not certain that the Water Resource Board would have the political will to change the use to instream flow or that the process would not be challenged in court.

*Recognized Beneficial Uses for Instream Flow:*

State law requires that instream flow rights be the "minimum flow of water required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest" (Idaho Code 42-1502(f)).

*Holdership of Instream Flow Water Rights:*

The Idaho Water Resources Board is the only entity that can apply for and hold new appropriations for instream flow water rights. Private ownership is possible on a temporary basis through the water banks.

*Quantification Requirements and Procedures:*

As with any water right in Idaho, the holder is limited to the minimum amount necessary for the beneficial use. When applying for a new instream flow right, the board must quantify the minimum amount necessary for the beneficial use indicated. In practice, however, the Water Resources Board most often applies for all unappropriated water in a stream segment in order to protect aesthetic beauty and preserve the natural habitat.

**Federal Reserved Water Rights:**

Federal reserved water rights in Idaho are handled through the general adjudication process. The federal government must make a claim during adjudication and participate in the adjudication process. Only federal reserved rights in the Snake River Basin are currently being adjudicated. Federal reserved rights outside of this basin will not be adjudicated until the Snake River Basin is completed.

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**Appendix One: Criteria Used to Evaluate Water Allocations in the Snake River Basin**

In areas of the Snake River Basin held in trust for the Idaho Power Co., the director of the IDWR must consider, in addition to his normal considerations, whether or not the new use of water will significantly reduce the flows available for power generation. If it is determined that a significant reduction will occur, the director must consider the following criteria:

- \* The potential benefits that the proposed use would provide to the state and local economies.
- \* The economic impact the proposed use would have upon electric utility rates in Idaho, as well as the availability and cost of alternative energy sources, to ameliorate any impact
- \* The promotion of the farming tradition.
- \* The promotion of full economic and multiple use development of Idaho water resources.
- \* In the Snake River Basin above the Murphy gauge, whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in a four year period.

## **Appendix Two: Types of Applications**

Water Right / Water Bank Forms:

- \* Application for Permit
- \* Assignment of Application for Permit
- \* Assignment of Permit
- \* Application for Amendment of a Permit
- \* Request for Extension of time for Proof of Beneficial Use
- \* Proof of Beneficial Use
- \* Application for Temporary Approval of Water Appropriation
- \* Application for Transfer of Water Right
- \* Temporary Change Application
- \* Application for Extension of Time to Avoid Forfeiture of a Water Right
- \* Application for Exchange of Water
- \* Notice of Change of Water Right Ownership
- \* Application to Sell or Lease a Water Right to the Water Supply Bank
- \* Application to Rent Water From the Water Supply Bank
- \* Notice of Protest
- \* Notice of Instream Diversion Stockwater Use of Water
- \* Affidavit for Water Rights to Be Used for Power Purposes
- \* Certified Water Rights Examiner Application